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December 8, 2004

EX PARTE

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

RE: *Unbundled Access to Network Elements,* WC Docket No. 04-313; *Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338

Dear Ms. Dortch:

In previous filings, Qwest has emphasized the need for the Commission to clarify in the upcoming *Remand Order* that states have no authority over commercial agreements, such as the Qwest Platform Plus ("QPP") agreement that address network elements that do not meet the impairment test in the Act (*i.e.* are not offered to Sections 251(b) or (c) of the Act). A recent decision by the Minnesota PUC provides a vivid illustration of the need for the Commission to take action in this area now. On December 3, 2004, the Minnesota PUC rejected Qwest's commercial agreement with MCI for Qwest Platform Plus ("QPP"), which is a commercial substitute for the unbundled network platform ("UNE-P"). The QPP agreement resulted from a series of mediation sessions between Qwest and the CLEC industry and months of intense negotiations between Qwest and MCI. The agreement reflects numerous tradeoffs between Qwest and MCI. It provides MCI certainty that a platform product will continue to be available in Qwest's territory at a rate that is only slightly higher on average than UNE-P. The agreement also provides MCI with other benefits that were not available under its interconnection agreement, such as reductions in batch hot cut rates and new functionalities in the batch hot cut process. After the agreement was consummated with MCI, 14 other CLECs signed the QPP agreement.

In the attached decision, the Minnesota PUC rejects the QPP agreement, based on its finding that the agreement violates that commission's view of the public interest, convenience, and necessity with respect to six issues. Among other things, the Minnesota PUC rejects the parties' decision to address disputes arising under the agreement through alternative dispute resolution mechanisms and other venues other than the Minnesota PUC. The Minnesota PUC concludes that it must retain the ability to "set aside any arbitration or other ADR decision interpreting, construing, applying or amending the interconnection agreement in a manner contrary to the public interest." Decision at 13. Similarly, the Commission rejected third-party beneficiary language in the QPP agreement because it "does not explicitly acknowledge the Commission's continuing oversight of, and interest in, the parties' dealings under the interconnection agreement. Decision at 14. Thus, the Minnesota PUC has expressed its intent to

assert continuing authority over the QPP agreement, and to override terms in the commercially-negotiated agreement that it deems are not consistent with its open-ended view of the public interest, convenience, and necessity.

The Minnesota PUC's decision demonstrates that state commission oversight over commercial agreements is not merely ministerial. In this case, the state commission intends to nullify the good-faith understandings that were reached as part of the give-and-take of commercial negotiation. As such, these assertions of state authority over commercial agreements conflict with the Commission's stated intent of encouraging such agreements.

As a result, the Commission, at a minimum, should clarify in the upcoming order that states have no authority over commercial agreements,[1] such as the QPP agreement, that address network elements that are not offered under Sections 251(b) or (c) of the Act. In order to reduce any uncertainty about the impact of the Commission's clarification, it should specify that state commissions have no authority over agreements that provide a commercial substitute for network elements that the Commission has found a lack of impairment, such as the QPP agreement or Qwest's agreement on a commercial line sharing product. Without such a ruling, it is likely that state regulators will continue to assert authority over these agreements, and that some states will even attempt to modify or invalidate agreements or portions of agreements, as the Minnesota Commission has done. Such actions greatly reduce the incentive and ability of ILECs and CLECs to negotiate such agreements in the future.

[1] Qwest continues to believe that the Commission should also explicitly preempt all state regulatory jurisdiction over such agreements.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer		Chair
Marshall Johnson		Commissioner
Ken Nickolai		Commissioner
Thomas Pugh	DEC 3	Commissioner
Phyllis A. Reha		Commissioner

In the Matter of Qwest Corporation and MCImetro Access Transmission Services Amendment to Interconnection Agreement

ISSUE DATE: December 2, 2004

DOCKET NO. P-5321, 421/CI-04-1178

ORDER APPROVING AMENDMENT, DENYING MOTION TO DISMISS AND REJECTING MASTER SERVICE AGREEMENT

PROCEDURAL HISTORY

On August 2, 2004, MCImetro Access Transmission Services, LLC (MCImetro) filed an amendment to its existing interconnection agreement (Amendment) and also a Master Service Agreement (MS Agreement) between MCImetro and Qwest. MCImetro submitted both the Amendment and the Master Service Agreement for Commission review and approval.

On August 12, 2004, the Minnesota Department of Commerce (the Department) filed comments recommending approval of the Amendment between MCImetro and Qwest. The Department did not make a recommendation on the MS Agreement.

On August 12, 2004, Qwest filed a motion to dismiss MCImetro's application for review and approval of the MS Agreement. Qwest disagreed with MCImetro that Section 252 of the Act required or authorized the Commission to review and approve the MS Agreement.

On September 14, 2004, the Commission issued a Notice for Comments Regarding Qwest's Motion to Dismiss.

On September 24, 2004, AT&T requested an extension of time to file its comments.

On September 24, 2004, MCImetro and the Department filed their comments.

On September 28, 2004, AT&T filed its comments.[1]

On September 30, 2004, Department filed supplemental comments clarifying its September 24, 2004 comments.

On October 1, 2004, MCImetro filed reply comments.

The Commission met on October 21, 2004 to consider this matter.

FINDINGS AND CONCLUSIONS

I. MCImetro's Requests for Approval

In its August 2, 2004 filing, MCImetro requested that the Commission review and approve two documents that MCImetro had executed with Qwest on July 16, 2004: 1) an amendment to MCImetro's interconnection agreement (ICA) with Qwest and 2) a Master Service Agreement.

A. Amendment to the ICA

The term of the Amendment begins on July 16, 2004 and terminates July 31, 2008. The Amendment relates to the offering of unbundled mass market switching or unbundled enterprise switching and unbundled shared transport in combination with other network elements as part of the unbundled network element platform and Batch Hot Cuts. Pursuant to the Amendment, as soon as Qwest deployed its Batch Hot Cut System Tool and amended its Appointment Scheduler to accommodate Batch Hot Cut orders, Qwest would provide Batch Hot Cuts to MCImetro upon established rates, terms, and conditions.

B. Master Service Agreement

MCImetro stated that the parties entered into an MS Agreement to address the uncertainty created by the DC Circuit Court's March 2, 2004 decision[2] and to create a stable arrangement for the continued availability to MCImetro from Qwest of services technically and functionally equivalent to the June 14, 2004 UNE-P arrangements. The service Qwest agreed to furnish, which continues the June 14, 2004 UNE-P functionality, is known as Qwest Platform Plus™ (QPP™).

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[1] AT&T, MCImetro and the Department all filed comments after the deadline in the Commission's Notice for Comment. AT&T requested an extension to file its comments late, the Department supplemented its earlier comments filed on time, and MCImetro replied to the Department's supplemental comments and commented on a recent Utah decision on a similar motion filed by Qwest in Utah. It does not appear that any party has been prejudiced by the late filing of comments.

[2] *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004),referred to hereafter as USTA II.

II. Parties' Comments Regarding the Proposed Amendment to the ICA

No party contended that the proposed amendment to the ICA was not properly before the Commission for review and approval.

MCImetro and Qwest stated that the Amendment is consistent with prior Commission precedent and recommended that it be approved. AT&T did not comment on this issue. The Department also recommended approval.[3]

III. Commission Analysis and Action Regarding the Proposed Amendment to the ICA

The Amendment essentially makes three changes to the ICA. First, the Amendment adds hot cut terms and conditions to the ICA arrangements. Second, the Amendment provides that Qwest will not offer and MCImetro will not order unbundled mass market and enterprise switching and unbundled shared transport in combination with other network elements as part of UNE-P. Third, the Amendment makes line-splitting available for loops provided under the ICA.

The Amendment also states that MCImetro agrees that it will waive any rights under applicable law in connection with obligations governed by sections 251 and 252. The Amendment allows either party to immediately, upon written notice to the other party, terminate the Amendment and MS Agreement if the FCC, state commission or any governmental agency rejects or modifies any material provision of the Amendment.

No party contended that it was not properly before the Commission for review and approval and no party recommended against Commission approval of the Amendment.

Under the Act, state commissions are to approve or reject such negotiated agreements, making written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Negotiated agreements may be rejected for the following reasons: (1) they discriminate against a telecommunications carrier who is not a party to the agreement; (2) implementing them would be inconsistent with the public interest, convenience, and necessity; (3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements. 47 U.S.C. § 252(e)(2) and (3).

The Commission finds that the terms of the Amendment do not violate any of the three standards set forth in 47 U.S.C. § 252(e)(2) and (3). First, they do not discriminate against a telecommunications carrier who is not a party to the agreement. Second, implementing them would be not be inconsistent with the public interest, convenience, and necessity. And third, they do not conflict with any valid state law, including any applicable intrastate service quality standards or requirements. The Commission will therefore approve the Amendment.

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[3] In subsequent comments filed on October 1, 2004, the Department raised a concern regarding the failure to include Commission approved language regarding six subjects: disconnections, default, assignment, amendment, dispute resolution, and third party beneficiaries). The Department has clarified that this concern applied not to the amendment to the interconnection agreement but to the Master Service Agreement.

IV. Qwest's Motion to Dismiss Petition Regarding Master Service Agreement

Qwest acknowledged that the amendment to its ICA with MCImetro was subject to the Commission's review and approval pursuant to Section 252 of the Federal Telecommunications Act of 1996 (the Act), but contended that the MS Agreement was not subject to Sections 251 or 252 and, therefore not subject to Commission review and approval.

Qwest cited two authorities that it argued established that the MS Agreement is not subject to either section 251 or 252 and is therefore not subject to review and approval by the Commission.

- First, Qwest cited the USTA II (March 2, 2004) decision.[4] Qwest argued that the MS Agreement relates to network elements that USTA II makes clear are no longer required to be unbundled pursuant to Section 251 or 252 of the Act.

- Second, Qwest cited the October 2002 FCC declaratory order (Declaratory Order) discusssing the scope of the mandatory filing requirement set forth in section 252(a)(1).[5]

Qwest maintained that these two authorities read together definitively establish that the MS Agreement is not subject to either section 251 or 252 and is therefore not subject to review and approval by the Commission. Qwest stated that only agreements pertaining to the provision of services required under Section 251(b) and (c) of the Act constitute "interconnection agreements" that must be filed under Section 252. Qwest argued that since the MS Agreement did not pertain to the provision of an "unbundled network element" under Section 252(c) or to any other facility or service provided under Section 251(b) or (c), it is not within the Section 252 filing requirement.

In addition, Qwest asserted that the FCC has exclusive jurisdiction over this contract, a contract for non-251 network elements, for three reasons. First, Qwest argued that since in many cases the elements are required under federal law to be provided on an unbundled basis by Regional Bell Operating Companies (RBOCs) under Section 271(c)(2)(B) of the Act, the unbundling obligation and the jurisdiction to review the contracts for these elements is federal. Second, Qwest asserted that network elements remain subject to federal jurisdiction even after they have been removed from the list of Section 251(c)(3) elements. Third, Qwest argued that contracts between carriers for network elements that do not meet the "necessary" and "impair" tests fall within express federal filing jurisdiction.

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[4] See footnote 2.

[5] Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket No, 02-89, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (October 4, 2002) ¶ 1.

V. Comments Regarding Qwest's Motion to Dismiss MCImetro's Petition With Respect to the Master Service Agreement

A. The Department

The Department recommended that the Commission deny Qwest's motion. The Department noted that the services to be provided pursuant to the MS Agreement were switching and transport services. The Department stated that the FCC's Interim Triennial Review Order (Interim TRO)[6], issued August 20, 2004, reestablished Qwest's obligation to provide switching and transport as section 251 unbundled network elements (UNEs). The Department reasoned that because these elements are 251 elements in accordance with the Interim TRO, the Commission is required to approve or reject the MS Agreement in accordance with section 252. The Department stated that by simply placing the switching and transport network elements into a commercial agreement, Qwest did not eliminate its 251/252 obligations for those elements or the Commission's authority to review and approve that agreement.

B. AT&T

AT&T recommended that the Commission deny Qwest's Motion and require Qwest to seek approval of its Master Service (MS) Agreement.

AT&T cited Section 252(e)(1):

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.[7]

AT&T noted that the FCC has declined to adopt a definitive interpretation of the term "interconnection agreement" as used in section 252(e). The Company noted that in the FCC's Declaratory Ruling, the FCC stated:

> We decline to establish an exhaustive, all-encompassing "interconnection agreement" standard.[8]

AT&T argued that the FCC has determined that the scope of what must be filed is exceedingly broad and has left the determination of what must be filed up to the states to make on a case-by-case basis.[9]

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[6] *In the Matter of Unbundled Access Network Elements*, Order and Notice of Proposed Rulemaking, FCC 4-179 (August 20, 2004).

[7] 47 U.S.C. § 252(e)(1).

[8] *Qwest Communications International Inc.'s Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276 (rel. Oct. 4, 2002), ¶ 10.

[9] Id.

AT&T stated that the FCC has provided guidance, however, defining the narrow scope of agreements that need not be filed. AT&T stated that the FCC has specified the agreements not required for filing as follows: those concerning dispute resolution, escalation provisions whose terms are not otherwise publicly available, settlement agreements that do not affect an incumbent LEC's ongoing obligations under section 251, forms used to obtain service, and certain agreements entered into during bankruptcy.[10]

AT&T asserted that Qwest made an improper distinction between agreements regarding provision of network elements required by the FCC rule (agreements which Qwest agrees must be reviewed and approved by the Commission) and agreements regarding the provision of other network elements (agreements which, according to Qwest, need not be reviewed and approved by the Commission). AT&T stated that the Act creates no such distinction. AT&T asserted that any request for network elements, even if the element is not required by FCC rule, triggers the incumbent local exchange carrier's (LEC's) duty under Section 251(c)(1) to negotiate in good faith in accordance with Section 252 and its duty under Section 251(c)(3) to provide such elements subject to good faith negotiations.

AT&T stated that whenever the incumbent LEC has agreed to provide network elements or their functional equivalent, the agreement must be filed with the state commission for approval. AT&T stated that Qwest's interpretation, that parties to an agreement to provide network elements could avoid Commission review for approval simply by adopting certain contract language (stating, for example, that the agreement was outside the purview of Sections 251 and 252) would render Section 252(e)(1) meaningless.[11]

VI. Commission Analysis and Action Regarding Qwest's Motion to Dismiss

Having heard and considered the parties' written and oral comments, the Commission will deny Qwest's motion. The Commission does not agree with Qwest's assertion that the MS Agreement need not be submitted to the Commission for review and approval.[12]

Qwest has asserted that agreements regarding network elements required to be provided by the Act must be submitted to state commissions for their review but that agreements (such as the MS Agreement) that provide for other network elements may be formed and implemented without commission review and approval. The Commission does not find the distinction that Qwest asserts between agreements regarding network elements required to be provided and agreements to provide other network elements. All negotiated agreements for network elements must be filed with the Commission for approval.

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[10] Id. ¶¶ 9, 12-14.

[11] Section 252(e)(1) states: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1).

[12] The Department's argument that the FCC's Interim Triennial Review Order issued August 20, 2004 reestablished Qwest's obligation to provide switching and transport as section 251 UNEs leads to the same result.

Qwest's reliance on the FCC's Declaratory Order (October 4, 2002) to exempt the MS Agreement from Commission review and approval is misplaced. In that Order the FCC listed a number of types of agreements that must be filed pursuant to section 252(a)(1), including agreements that, like the MS Agreement, deal with "interconnection, services, or network elements." In support of a contrary result, Qwest cites language in footnote 26 of the Declaratory Order but in doing so stretches it beyond its intended application. Rather than contradicting the language quoted from the Order's main text, the footnote language simply responds to the contentions made by the comments identified in the footnote. These comments had advocated that the Section 252(a)(1) filing requirement should be applied to every agreement between an incumbent LEC and another carrier, including settlement agreements that resolved past disputes. Understood in context, Footnote 26 does not attempt to reverse the above-cited language in the body of the Declaratory Order nor, of course, to contradict the unambiguous statutory language of Section 252(a)(1).

The second authority Qwest cited for its position was the U.S. Court of Appeals decision in USTA II. In this order, the Court of Appeals vacated the FCC's determinations identifying which network elements fell within the impairment analysis of Section 251(d) and the FCC's delegation to state commissions to make further, limited impairment determinations. As a result, Qwest stated, it was no longer obligated to provide unbundled access to local switching or shared transport pursuant to Section 251and therefore not required to file for approval any agreements to provide those elements.

Qwest's argument is faulty because it rests on the false premise that only agreements to provide required network elements need be filed for approval. As noted above, the Act does not distinguish between agreements to provide mandatory network elements and agreements to provide "other" network elements. Congress' unambiguous statutory language is that voluntary negotiated agreements made ". . . without regard to the standards set forth in subsections (b) or (c) of section 251 . . . shall be submitted to the State commission under subsection (e) of this section."[13]

The MS Agreement at issue in this case is a voluntary negotiated agreement for the provision of network elements: switching and transport. A plain reading of the Act, therefore, requires this negotiated agreement for network elements to be filed for approval with the Commission.

In addition to contravening the Act's plain language, Qwest's interpretation is at odds with the public policy promoted by the Act. In the Act, Congress has given state commissions particular responsibilities to assure nondiscriminatory interconnection arrangements between incumbent LECs and their competitors. One of the chief tools that Congress gave state commissions to fulfill that role is the authority to review and approve or reject interconnection agreements. And one of the ways Congress has sought to assure that state commissions will be in a position to exercise that authority is by directing that interconnection agreements be filed with State commissions for review and approval.

Qwest's interpretation that parties can avoid Commission review by putting formulaic language in their agreement would render Section 252(e)(1) meaningless and vitiate the state commission's statutory duty to determine whether any provisions of an interconnection agreement are discriminatory, inconsistent with the public interest, convenience, and necessity, or conflict with any valid state law. The Commission does not believe that the will of Congress can be circumvented by inventive contract wording. Calling a document a "commercial agreement" rather than an interconnection agreement and asserting in the contract that the agreement was negotiated "outside the meaning of Section 252(a)(1)" does not control.

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[13] 47 U.S.C. Section 252(a)(1).

The actual nature of the agreement, not its title, determines its regulatory treatment. Contract language purporting to deflect Commission review does not trump plain statutory bestowal of authority and clearly expressed Congressional intent that state commissions assess proposed interconnection agreements in light of the three standards articulated in Section 252(e)(1).

In short, then, since the document in question is an interconnection agreement, it must be submitted to the Commission for review and approval pursuant to Section 252(a)(1) and (e)(1).

The Commission notes that to date several other state commissions have considered and rejected the position that Qwest has argued in this matter, that the only agreements that must be filed for approval are agreements to provide network elements required to be provided under Section 251 (California[14], Michigan[15], Texas[16], and Utah[17]) and none have adopted it.

Qwest has argued that all these state commission rulings are flawed because they fail to recognize that commission review and approval is only required for agreements to provide network elements "pursuant to section 251(b) and (c) of the Act." As noted previously, however, there is no merit in Qwest's argument that the only interconnection agreements that must be reviewed and approved are those providing network elements that are required to be provided under Section 251(b) or (c). The plain language of 47 U.S.C. Section 252(a)(1) does not exempt any interconnection agreements from Commission review and approval.

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[14] The California Public Utilities Commission stated: "In order for the Commission to perform this statutory duty [under Section 252(e)(2) of the Act], the interconnection agreement must be formally filed with the Commission and open to review by any interested party." Letter from Randolph L. Wu, State of California Public Utilities Commission, to SBC Communications, Inc. (April 21, 2004).

[15] Order of the Michigan Public Service Commission, Case No. U-14121 (April 28, 2004). The Commission held that under the Act "interconnection agreements arrived at through negotiations must be filed with and approved by [the state Commission]."

[16] Order of Public Utilities Commission of Texas (May 13, 2004). Citing the FCC's Qwest Declaratory Ruling, the Texas Commission held that "the filing and review requirements are the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."

[17] Order of the Public Service Commission of Utah, Docket No. 04-2245-01 (September 30, 2004). In this docket before the Public Service Commission of Utah, MCI had filed with the Commission an amendment to an interconnection agreement and a Master Service Agreement for review and approval. As in the instant docket, Qwest filed a Motion to Dismiss raising the same arguments it has raised in this docket. The Public Service Commission of Utah issued an ORDER DENYING MOTION TO DISMISS, addressing and rejecting all Qwest's arguments.

VII. Evaluation of the Master Service (MS) Agreement

Because the Qwest/MCImetro MS Agreement is an interconnection agreement properly before the Commission for review and approval, the Commission will proceed in this section to evaluate that agreement.

A. Description of the MS Agreement

The MS Agreement provides MCImetro with Qwest services that allow MCImetro to provide both telecommunications and information services. Services include local switching and shared transport in combination to the extent available on UNE-P under an applicable interconnection agreement or Qwest's statement of generally available terms (SGAT). Also available for purchase are services under Qwest's Advanced Intelligent Network services, Qwest Digital Subscriber Line (DSL) services, and Qwest Voice Messaging Services. The rates for these services are in addition to the applicable rates for elements and services provided under the Qwest/MCImetro Interconnection Agreement (ICA). The term of the MS Agreement is from July 16, 2004 to July 31, 2008.

While MCImetro can no longer purchase UNE-P, for all intents and purposes the newly packaged service provided pursuant to the MS Agreement is the same except that the prices that MCImetro pays for network elements are now set under the MS Agreement.

B. The Department's Objection and Recommendation Regarding the Proposed MS Agreement

The Department stated that its review of the proposed MS Agreement showed that the agreement's language did not comply with the Commission's requirements for interconnection agreements on the following six issues:

- Disconnections
- Default
- Assignment
- Amendment
- Dispute Resolution
- Third Party Beneficiaries

The Department recommended that the Commission not approve the proposed MS Agreement unless it was amended to include the approved language previously approved by the Commission regarding these six issues.

C. AT&T's Position Regarding the Proposed MS Agreement

As noted previously, AT&T argued that the proposed MS Agreement must be reviewed by the Commission but did not take any position on whether the MS Agreement met the standards for approval.

D. Qwest and MCImetro Response to the Department's Recommendation

Qwest did not address the Department's recommendation that Commission-approved language on the six subjects must be added to the MS Agreement.

MCImetro did not object to the Department's recommendation. MCImetro stated that if the Commission concluded that certain additional provisions are required by Commission precedent to be included in the MS agreement, it should order the parties to include those provisions.

E. Commission Analysis and Action Regarding the MS Agreement

As found in the previous section regarding Qwest's Motion to Dismiss, the MS Agreement is properly before the Commission for review and approval.

Under the Act, state commissions are to approve or reject such negotiated agreements, making written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Negotiated agreements may be rejected for the following reasons: (1) they discriminate against a telecommunications carrier who is not a party to the agreement; (2) implementing them would be inconsistent with the public interest, convenience, and necessity; (3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements. 47 U.S.C. § 252(e)(2) and (3).

Based on the following analysis, the Commission finds that the terms of the MS Agreement do violate the second standards (public interest, convenience, and necessity) with respect to the six subject areas identified by the Department.

1. Disconnection - Section 8.3

Section 8.3 of the MS Agreement permits Qwest to terminate service to MCI if MCI fails to make payments due under the contract and requires MCI to notify its customers that service is being terminated. In previous dockets involving proposed interconnection agreements, the Commission has required interconnection agreements to make it clear that the incumbent cannot terminate service to the competitor without Commission approval and that the competitor must give its customers ten days notice that their service will be terminated.[18] The public interest, convenience and necessity require that these terms be included in the contract at issue.

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[18] *In the Matter of the Joint Application of KMC Telecom, Inc. and US WEST Communications, Inc. for Approval of an Interconnection Agreement,* Docket No. P-5426, 421/M-97-850, ORDER REJECTING INTERCONNECTION AGREEMENT (August 13, 1997). See also: *In the Matter of the Application by Info-Tel Communications, Inc. for Approval of Agreement for Service Resale under the Federal Telecommunications Act of 1996, Section 252(e)*, Docket No. P-5298,421/M-97-32, ORDER APPROVING CONTRACT (April 14, 1997); *In the Matter of the Petition of Choicetel, Inc. for Approval of an Interconnection Agreement for the Resale of U S WEST Communications, Inc.'s Service under the Telecommunications Act of 1996, Section 252(e)*, Docket No. P-5243,421/M-97-171, ORDER APPROVING CONTRACT (May 14, 1997); *In the Matter of the Joint Application of OCI Communications of Minnesota, Inc. and U S WEST Communications, Inc. for Approval of an Interconnection Agreement*, Docket No. P-5478,421/M-97-522, ORDER REJECTING INTERCONNECTION AGREEMENT (July 22, 1997).

As the Commission has consistently noted, telephone service is essential to nearly all Minnesota households and businesses. Service interruptions are inconvenient at best and hazardous at worst. This Commission and all telecommunications providers have a responsibility to do everything possible to prevent sudden or unexpected interruptions of service. This means two things -- (1) carriers must not disconnect service to one another without good cause and Commission permission; and (2) customers whose carrier is being disconnected must receive enough notice to make an informed choice of another carrier and to complete service arrangements with that carrier.

The Commission believes the contract must make it clear that Qwest cannot terminate service to MCI without Commission permission. It has long been state policy to prohibit telecommunications providers from severing connections with, or discontinuing service to, another provider without Commission permission.[19] This prohibition was originally intended to protect the integrity of the state's interexchange network. It is, if anything, more necessary with the advent of local exchange competition, when not just interexchange connections, but the local network itself, can be jeopardized by hasty or unjustified severing of connections.

Similarly, customer notification of impending disconnection is now more important than ever. In the past customers facing disconnection were typically dealing with payment issues; there was no issue as to which company would serve once those were resolved. In the competitive era, a customer, especially one with sophisticated communications needs, could be facing the need to do a significant amount of "comparison shopping" before selecting another carrier.

It is therefore important that the contract make it clear that MCImetro must give its customers notice, should Qwest terminate service and leave MCImetro unable to serve.

2. Default - Section 11

Section 11 of the MS Agreement, the default provisions of the MS Agreement, permits either party, upon default by the other party, to seek relief in accordance with the Dispute Resolution provision or any other remedy under this Agreement. Section 11 does not explicitly require notice to the Commission of any alleged default, however. The Commission believes that the public interest, convenience, and necessity require that either party notify the Commission at the same time that it notifies the other party of any alleged default.

Telephone service is essential to nearly all Minnesota households and businesses. Service disruptions are inconvenient at best and hazardous at worst. This Commission and all telecommunications providers have a responsibility to do everything possible to prevent sudden or unexpected interruptions of service. To meet this responsibility, the Commission needs the earliest possible notice of inter-carrier disputes, claims of default, and decisions to terminate interconnection agreements.

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[19] See Minn. Stat. § 237.12, subd. 2; *In the Matter of Three Petitions to Discontinue Service to Access Plus*, Docket Nos. P-999/CI-92-1061; P-421/EM-92-999; P-3006/M-92-1032; P-478/EM-92-1031.

The Commission will therefore reject the contract's default provisions[20], noting that the deficiencies discussed above could be cured by adopting the language approved in other negotiated interconnection agreements.[21]

3. Assignment - Section 16

Section 16 of the proposed MS Agreement permits either party to assign or transfer its rights and obligations thereunder, subject to specified conditions. In a consistent line of Orders regarding assignment provisions of interconnection agreements the Commission has required 60 days notice to the Commission of any proposed assignment or transfer.[22]

The Commission continues to believe that it must receive prior notice of any proposed assignment or transfer. Telecommunications services are essential to the public safety and to the everyday operation of our society and economy. The Commission cannot protect the public interest in reliable service unless it can examine the fitness of prospective assignees or transferees.

The Commission will therefore reject the assignment provision as inconsistent with the public interest, convenience, and necessity. The Commission notes the deficiency could be cured by adding a provision requiring 60 days notice to the Commission of any proposed assignment or transfer.

4. Amendment

In previous Orders, the Commission has found that any contract amendment must be approved by the Commission.[23] In this docket also, the Commission finds the contract's failure to require Commission

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[20] For a similar analysis and result, see *In the Matter of the Joint Petition of Sprint Minnesota, Inc. and Dakota Services Limited for Approval of an Interconnection Agreement*, Docket No. P-5669, 430/M-99-701, ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILINGS (July 14, 1999).

[21] See *In the Matter of the Joint Application of Nextel West Corp. and U S WEST Communications, Inc. for Approval of an Interconnection Agreement*, Docket No. P-421/EM-98-323,ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILINGS (May 21, 1998), pages 3-4.

[22] See, e.g. *In the Matter of the Joint Application of Harmony International and U S WEST Communications, Inc. for Approval of an Interconnection Agreement*, Docket No. P-421/EM-98-1865, ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILINGS (February 22, 1999) at page 3.

[23] See. e.g., *In the Matter of the Joint Petition of Sprint Minnesota, Inc. and Tin Can Communications, L.L.C. for Approval of a Master Resale Agreement*, Docket No. P-430/AM-98-653, ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILINGS (July 14, 1998) and *In the Matter of an Application by WinStar Wireless of Minnesota, Inc. and Contel of Minnesota, Inc. d/b/a GTE Minnesota for Approval of an Interconnection Agreement*, Docket No. P-407,5246/M-98-9, ORDER REJECTING INTERCONNECTION AGREEMENT (March 23, 1998).

approval of amendments inconsistent with the public interest, convenience, and necessity. The Commission cannot perform its duty to protect the integrity of the network, ensure high quality service, and promote a free and open telecommunications market if interconnection agreements can be amended without Commission approval.

This would not only leave the public interest unprotected, it would render meaningless the Act's requirement that state commissions review and approve interconnection agreements. To guard against such a development, the Commission has required adding the following language: "Any amendment to this agreement shall be approved by the Minnesota Public Utilities Commission."[24]

In this case the Commission finds likewise, that the public interest, convenience, and necessity require such language. Failure to provide for Commission review and approval of contract amendments would leave the public interest unprotected.

5. Dispute Resolution - Section 27

Section 27 of the MS Agreement does not require that parties submit disputes arising thereunder to the Commission and authorizes them to utilize other forums including non-Commission arbitration proceedings and other alternative dispute resolution (ADR) venues, as well as state and federal courts and administrative agencies.

The Commission believes the public interest, convenience, and necessity require it to retain the ability to set aside any arbitration or other ADR decision interpreting, construing, applying or amending the interconnection agreement in a manner contrary to the public interest. The Commission is charged with maintaining the integrity of the network, ensuring high standards of consumer protection, and nurturing a competitive telecommunications environment. The Commission cannot discharge these responsibilities while ceding final authority over interconnection agreements to independent arbitrators or other ADR practitioners. The Commission must be recognized as having authority to review the arbitrators' decisions.

The Commission will therefore reject the MS Agreement's dispute resolution provisions.[25]

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[24] *In the Matter of the Application for Approval of the Agreement for Interconnection and Traffic Interchange between Cellular Mobil Systems of St. Cloud, Minnesota L.L.P. and US WEST Communications, Inc.*, Docket No. P-421/EM-97-437, ORDER REJECTING CONTRACT (July 28, 1997).

[25] For a similar analysis and result, see *In the Matter of the Joint Petition of Sprint Minnesota, Inc. and Tin Can Communications, L.L.C. for Approval of a Master Resale Agreement*, Docket No. P-430/AM-98-653, ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILINGS (July 14, 1998) at pages 2-3.

The deficiency can be cured by adopting the dispute resolution language appearing in Commission-approved negotiated interconnection agreements.[26]

6. Third Party Beneficiaries - Section 30

The third-party beneficiary language in Section 30 of the Agreement does not explicitly acknowledge the Commission's continuing oversight of, and interest in, the parties' dealings under the interconnection agreement. The Commission finds that the contract's failure to acknowledge the Commission's continuing responsibility to monitor performance thereunder compels its rejection. Under Minnesota law and the Federal Act, the Commission has a duty to protect the public interest as it is affected by interconnection agreements. This duty does not end at the time of final contract approval, but continues throughout the life of the contract, as its consequences unfold.

In order to fulfill its ongoing regulatory duty, the Commission must have notice of any further administrative or judicial or other proceeding regarding the contract, and the opportunity to intervene in the proceeding on behalf of the general public. The Commission finds the agreement inconsistent with the public interest, convenience, and necessity for failure to afford the Commission the necessary notice and opportunity to intervene. The public interest requires the addition of the following language, as previously approved:

> Notwithstanding the foregoing, parties agree to give notice to the Public Utilities Commission (MPUC) of any lawsuits or other proceedings that involve or arise under the agreement to ensure the MPUC has the opportunity to seek to intervene in these proceedings on behalf of the public interest.[27]

In sum: having reviewed the MS Agreement and the parties' comments, the Commission finds that the proposed agreement does not meet the standards for interconnection agreements with respect to the six areas identified by the Department. The Commission will therefore reject the MS Agreement without prejudice. It is anticipated that the parties will amend the agreement to include the language identified by the Department and that MCImetro will resubmit it, as amended.

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[26] See, e.g. the Dispute Resolution language approved in *In the Matter of the Application for Approval of an Interconnection Agreement Between Allegiance Telecom of Minnesota, Inc. and GTE Under the Federal Telecommunication Act of 1996*, Docket No. P-5880,407/M-00-236, ORDER APPROVING INTERCONNECTION AGREEMENT (June 5, 2000).

[27] *In the Matter of the Joint Petition of U S WEST Communications, Inc. and U S WEST Wireless, L.L.C. for Approval of an Interconnection Agreement*, Docket No. P-421/EM-98-369, ORDER REJECTING INTERCONNECTION AGREEMENT AND REQUIRING FURTHER FILINGS (June 2, 1998) at page 4.

ORDER

1. The Commission hereby approves Qwest/MCI's Amendment to their interconnection agreement.

2. Qwest's Motion to Dismiss MCI's application for review of the Master Service Agreement is denied.

3. The Master Service Agreement is rejected without prejudice for failure to contain six terms established by Commission precedent and required by the public interest, convenience and necessity.

4. Within two weeks of this Order, Qwest and MCImetro shall either file a revised Master Service Agreement incorporating the Department's recommended changes or inform the Commission that agreement has not been reached.

5. The Commission hereby delegates to the Executive Secretary authority to examine any revisions filed by the parties pursuant to Order Paragraph 4 and confirm whether appropriate changes have been made, and, if so, issue a letter to the parties approving the revised agreement as of the date the revisions were filed.

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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